TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1940~~ 1941

No. ~~782~~ 29

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

vs.

THE BETHLEHEM NATIONAL BANK OF BETHLEHEM, PENNSYLVANIA, AND L. M. REED, AS RECEIVER OF THE BETHLEHEM NATIONAL BANK OF BETHLEHEM, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1941.

CERTIORARI GRANTED MARCH 31, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF PENNSYLVANIA

No. 514 Civil Action

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION,
Plaintiff

vs.

THE BETHLEHEM NATIONAL BANK OF BETHLEHEM, PENNSYLVANIA, and L. M. Reed, as Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, Respondent

DOCKET ENTRIES

Sept. 13, 1939, Complaint filed.
Sept. 13, 1939, Summons exit to counsel for acceptance of service.
Sept. 18, 1939, Summons returned "service accepted" and with directions to enter appearance of H. P. McFadden, Esq., for defendants filed.
Oct. 5, 1939, Motion to dismiss and notice of motion filed.
Nov. 8, 1939, Stipulation of counsel as to certain facts filed.
Nov. 8, 1939, Argument sur motion to dismiss action.
Mar. 6, 1940, Opinion, Kirkpatrick, Judge, granting judgment for plaintiff on the pleadings filed.
Mar. 18, 1940, Stipulation of counsel and Order of Court substituting defendant filed.
May 20, 1940, Stipulation of counsel and Order of Court substituting party defendant filed.
[fol. 2] May 20, 1940, Stipulation of counsel as to entry of judgment filed.
May 20, 1940, Judgment in favor of plaintiff filed.
May 21, 1940, Noted and notice mailed.
June 18, 1940, Notice of defendant's appeal filed.
June 19, 1940, Copy to R. Slattery.

June 18, 1940, Copy of Clerk's notice to U. S. Circuit Court of Appeals filed.

July 25, 1940, Stipulation of counsel as to record on appeal filed.

July 31, 1940, Order of Court extending time for filing record on appeal filed. 8/1/40 Noted & notice mailed.

[fol. 3] In District Court of the United States, Eastern District of Pennsylvania

[Title omitted]

Complaint—Filed September 13, 1939

To the Honorable the Judges of the Said Court:

Plaintiff complains of the defendants, and for cause of action alleges:

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of the State of New York, and is and at the times hereinafter mentioned has been duly authorized by its charter to engage in the business of suretyship and qualified to engage in such business under the laws of the Commonwealth of Pennsylvania, and is and at said times has been engaged in said business in the Commonwealth of Pennsylvania.

2. That The Bethlehem National Bank of Bethlehem, Pennsylvania, is a national banking association and a corporation organized and existing under the laws of the United States, and in particular under the Act of Congress known as the "National Banking Act" and has its place of business in the City of Bethlehem, Pennsylvania, and is a citizen and resident of said Commonwealth of Pennsylvania.

3. That the defendant, Benjamin Nieman, is a citizen and resident of the State of Pennsylvania. That deeming such action necessary in order to conserve the assets of said The Bethlehem National Bank of Bethlehem, Pennsylvania, for the benefit of depositors and other creditors thereof, the Comptroller of the Currency of the United States of America did, on the 15th day of March, 1933, appoint one Charles Mohan conservator of said Bank. That thereafter

the said Charles Mohan duly qualified as such conservator, [fol. 4] and did under the direction of said Comptroller of the Currency take possession of the books, records and assets of said Bank, and did act as such conservator as provided by law, until August 3, 1933, when he resigned and was succeeded by one Fred T. Beckel who qualified and served as conservator of said Bank, by order and appointment of said Comptroller of the Currency, until March 26, 1934. That on or about March 26, 1934 the said Comptroller of the Currency made and issued his order appointing one Harry Margolis as receiver of said Bank, and that said Harry Margolis qualified and served as such receiver until April 20, 1937. That on or about April 20, 1937 the said Comptroller of the Currency made and issued his order appointing the defendant, Benjamin Nieman, as receiver of said Bank to succeed said Harry Margolis. That thereupon the said defendant, Benjamin Nieman, qualified as such receiver, took possession of the books, records and assets of every description of said Bank, and as such receiver is charged with the duty of liquidating, and is proceeding to liquidate, the business and assets of said Bank.

4. That the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000.00).

5. That on the 10th day of December, 1928, in order to secure the repayment of moneys deposited or to be deposited in said The Bethlehem National Bank of Bethlehem, Pennsylvania, by the Commonwealth of Pennsylvania, the plaintiff made, executed and delivered its depository bond in the sum of One Hundred Twenty Five Thousand Dollars ($125,0000.00), in behalf of said The Bethlehem National Bank of Bethlehem, Pennsylvania, and in favor of the Commonwealth of Pennsylvania.

6. That on March 15, 1933, on which date the aforesaid Charles Mohan was appointed conservator of said Bank, there was on deposit therein to the credit of the Commonwealth of Pennsylvania or its duly qualified State Treasurer the sum of One Hundred Thirty-Five Thousand Dollars ($135,000.00), the payment of which deposit was secured by the depository bond executed and delivered as aforesaid by the plaintiff and also by the pledge by said Bank to the Commonwealth of Pennsylvania of Twelve

Thousand Dollars ($12,000.00), par value of bonds of the [fol. 5] United States of America.

7. That thereafter, on October 16, 1933, the plaintiff paid to the Commonwealth of Pennsylvania upon its demand the sum of Fifty Thousand Dollars ($50,000,00) on account of plaintiff's liability under its said depository bond.

8. That thereafter, on March 27, 1934, a distribution of forty per cent (40%) of the amount of all deposits was made by Harry Margolis, then receiver of said Bank as aforesaid, and the amount of such distribution, to wit, the sum of Fifty-Four Thousand Dollars ($54,000.00) was thereby received by the Commonwealth of Pennsylvania, which had theretofore filed with said Bank duly executed proof of claim for One Hundred Thirty-Five Thousand Dollars ($135,000.00) as the aforesaid sum of its deposit.

9. That thereafter, on or about April 23, 1934, the aforesaid bonds of the United States of America were sold and the proceeds amounting to Twelve Thousand Four Hundred Eleven Dollars and Forty-four Cents ($12,411.44) were received by the Commonwealth of Pennsylvania.

10. That thereafter, on April 27, 1934, the plaintiff paid to the Commonwealth of Pennsylvania the sum of Twenty Thousand Seven Hundred Thirty-eight Dollars and Ninety Cents ($20,738.90) as further payment on account of its liability under its said depository bond, and on April 28, 1934 plaintiff paid to the said Commonwealth the sum of One Thousand Five Hundred Thirteen Dollars and Eighty-seven Cents ($1,513.87) in settlement of its said liability, which payment, together with the amounts previously received through the distribution by the receiver and through the sale of collateral and the prior payment by the plaintiff, fully satisfied and discharged the claim of said Commonwealth of Pennsylvania on account of the balance standing to its credit on deposit in said The Bethlehem National Bank of Bethlehem, Pennsylvania, on March 15, 1933 and amounting to the sum of One Hundred Thirty-five Thousand Dollars ($135,000.00) as aforesaid.

11. That thereafter, on May 10, 1934, the said Commonwealth of Pennsylvania, by its duly qualified State Treasurer, for value received as aforesaid, did duly assign, trans- [fol. 6] fer and set over to plaintiff its said claim against

said The Bethlehem National Bank of Bethlehem, Pennsylvania, and ever since said date plaintiff has been and now is the owner and holder of said claim.

12. That thereafter, on December 12, 1935, said Harry Margolis, as receiver of said Bank, made a second distribution to creditors thereof of twenty per cent (20%) of the amount of their deposits standing to their credit on the 4th day of March, 1933, and the defendant, Benjamin Nieman, on July 16, 1938, made a third distribution to said creditors of ten per cent (10%) of said deposits, but said Harry Margolis, as to said twenty per cent distribution, and the defendant, as to both said twenty per cent distribution and said ten per cent distribution, have failed and refused to make any distribution or to pay any dividend to plaintiff upon the basis of the deposit standing to the credit of the Commonwealth of Pennsylvania on March 15, 1933, and amounting to the sum of One Hundred Thirty-five Thousand Dollars ($135,000.00) which said claim has heretofore been assigned to and is now held by the plaintiff as aforesaid.

13. That instead of making distribution or paying the second said dividend to plaintiff, at the twenty per cent (20%) rate payable to depositors, upon the basis of the said Commonwealth of Pennsylvania deposit amount existing on March 15, 1933, said Harry Margolis, the first receiver, offered to pay plaintiff said dividend on the basis of a principal sum of One Hundred Twenty-two Thousand Five Hundred Eighty-eight Dollars and Fifty-six Cents ($122,588.56) only, and deducted from said dividend amount an alleged overpayment on the aforesaid first dividend paid to the Commonwealth of Pennsylvania; which offer, with the condition attached in and upon the official dividend receipt that it be accepted as a dividend on the full amount of the plaintiff's claim, said Harry Margolis first made on December 23, 1935 to plaintiff at the net amount of $19,553.13 upon a calculation given by him to plaintiff by letter of which a true and correct copy is hereto attached, marked Exhibit "A".

That subsequently, on July 11, 1936, said Harry Margolis, as receiver, reduced his aforesaid offer to pay said 20% [fol. 7] dividend to plaintiff to a dividend sum of $13,717.71, upon a calculation given by him to plaintiff by letter of which a true and correct copy is hereto attached, marked Exhibit "B".

14. That instead of making distribution or paying the said third dividend to plaintiff, at the ten per cent (10%) rate payable to depositors, on the basis of the deposits standing to the credit of the Commonwealth of Pennsylvania on March 15, 1933, the defendant, Benjamin Nieman, without then or previously withdrawing the aforementioned conditions of receipt imposed upon the plaintiff's acceptance of the payments offered by said Harry Margolis as receiver, offered on August 30, 1939 to pay to plaintiff said 10% dividend on the basis of a principal sum of $122,588.56 only. That from July 11, 1936 to August 30, 1939 no offer to pay any dividend on a basis of any sum greater than the sum of $68,588.56 mentioned in the aforesaid letter of July 11, 1936 hereto attached as Exhibit "B", was made by either said Harry Margolis or the defendant, Benjamin Nieman.

15. That the plaintiff is entitled to the allowance of its claim for and upon the basis of the full amount of the deposit standing to the credit of the Commonwealth of Pennsylvania on the 15th day of March, 1933, to wit, the sum of One Hundred Thirty-five Thousand Dollars ($135,000.00) and is entitled to receive dividends computed thereon until such dividends shall equal the amount remaining unpaid on said claim after crediting thereon the sum of $54,000 received by said Commonwealth of Pennsylvania as a distribution by the first receiver of the defendant bank (as set forth in Paragraph 3 hereof) and the further sum of $12,411.44 received by said Commonwealth of Pennsylvania through the sale of the collateral pledged to it (as set forth in Paragraphs 6 and 9 hereof).

16. That the plaintiff is entitled to the allowance of legal interest upon the amount of such dividends as have been heretofore approved and paid to other depositors of defendant bank, and withheld from the plaintiff as aforesaid, from the date of the distributions herein averred to the date of payment thereof by the defendant, Benjamin Nieman, to the plaintiff.

Wherefore, plaintiff prays judgment as follows:

1. That plaintiff's claim herein in the sum of One Hundred [fol. 8] Thirty-five Thousand Dollars ($135,000.00) be allowed against the defendant, Benjamin Nieman, as receiver of The Bethlehem National Bank of Bethlehem, Pennsyl-

vania, and that the Court enter judgment herein that the plaintiff is entitled to participate with the other creditors of the defendant bank upon its said debt of $135,000 ratably in all distribution of dividends, including all dividends yet to be paid by defendant receiver as well as those already paid by the defendant receiver and his predecessor in office, until such dividends, together with the amounts heretofore received by the Commonwealth of Pennsylvania as hereinbefore set forth shall equal the sum of $135,000.

2. That the defendant receiver be directed to pay to the plaintiff a dividend of twenty per cent (20%) and a dividend of ten per cent (10%) upon the basis of $135,000, as the same basis upon which other creditors in the list of common creditors were paid such dividends, and to pay to plaintiff ratably with other creditors upon the said sum of $135,000.00 all future dividends to be declared and made payable to said common creditors.

3. That defendant receiver be directed to pay to the plaintiff interest at the rate of six per cent (6%) per annum on the sum of $27,000, as said 20% dividend upon $135,000, from December 12, 1935 until said dividend is paid to plaintiff, and to pay to plaintiff interest at the rate of six per cent (6%) per annum on the sum of $13,500, as said 10% dividend upon $135,000 from July 16, 1938 until said dividend is paid to plaintiff.

4. That defendant receiver be required to pay the reasonable attorney's fees to be fixed by the Court and to be allowed to the plaintiff.

5. For plaintiff's costs herein incurred.

(S) Rutledge Slattery, (S) Frank P. Slattery, Attorneys for Plaintiff.

[fol. 9] EXHIBIT "A" TO COMPLAINT

THE BETHLEHEM NATIONAL BANK
Harry Margolis, Receiver
Third and Adams Streets
Bethlehem, Pa.
December 23, 1935

American Surety Company of New York,
Land Title Building,
Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

GENTLEMEN:

We desire to advise you that a second dividend, amounting to twenty per cent (20%), has been approved by the Comptroller of the Currency, and we are enclosing herewith a receipt for your dividend check in the amount of $19,553.13, as detailed in the following schedule:

Original deposit of the Commonwealth of Pennsylvania and subsequently assigned to the American Surety Co. on May 10, 1934	$135,000.00
Deduct: Proceeds from sale of 12M United States Treasury Bonds, 3 1/8%, 1946-1949 assigned to the Commonwealth of Pennsylvania as collateral for these deposits	12,411.44
Net Deposit	$122,588.56
First dividend of 40% actually paid (40%) of $135,000.00)	54,000.00
Correct amount of First Dividend amounting to 40% (40% of $122,588.56)	49,035.42
Net Excess Payment	$4,964.58
Second Dividend of 20% (20% of $122,588.56)	$24,517.71
Deduct: Excess payment in connection with distribution of First Dividend	4,964.58
Net Amount of Second Dividend	$19,553.13

Please sign this receipt, insert your address, and return promptly to this institution and the check will be forwarded to you by return mail.

Referring to your claim for interest indicated in your letter dated November 14th, the matter will be submitted to

the Comptroller of the Currency, and you will be notified as to his decision at a later date.

Yours very truly,

(sgd.) Harry Margolis, Receiver.

[fol. 10] EXHIBIT "B" TO COMPLAINT

THE BETHLEHEM NATIONAL BANK
Harry Margolis, Receiver
Third and Adams Streets
Bethlehem, Pa.

July 11, 1936

Mr. V. W. Nash, Manager,
American Surety Company,
100 Broadway,
New York, New York.

DEAR SIR:

Reference is made to your letters dated June 9th, May 19th, April 29th, March 7th, February 27th, 1936, and December 28, 1935, with respect to the second dividend due the American Surety Company, subrogee of the deposit claim due the Commonwealth of Pennsylvania by The Bethlehem National Bank.

We desire to advise you that the office of the Comptroller of the Currency, Washington, D. C., has authorized us to release a second dividend check amounting to $13,717.71, which represents twenty per cent (20%), of the principal balance you paid the Commonwealth of Pennsylvania in the amount of $68,588.56 as detailed in the following analysis:

Original Amount of Deposit		$135,000.00
Deduct: First dividend of Forty per cent, (40%), paid to Commonwealth of Pennsylvania	$54,000.00	
Proceeds from sale of collateral	12,411.44	66,411.44
Net Balance		$68,588.56
Twenty per cent dividend on Net Balance due the American Surety Company, subrogee,		$13,717.71

Your attention is directed to the decision of the United States Circuit Court of Appeals in the case of Ward v. First National Bank of Caruthersville, 76 F. (2) 256, and it is our opinion that under that decision the American Surety Company is entitled to future dividends on the sum of $68,588.56 only and should not receive dividends on the entire balance of the Commonwealth of Pennsylvania deposit as of the closing date.

Very truly yours,

(sgd.) Harry Margolis, Receiver.

[fol. 11] In District Court of the United States, Eastern District of Pennsylvania

[Title omitted]

Motion to Dismiss—Filed October 5, 1939

The defendants move your Honorable Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

(S.) H. P. McFadden, Attorney for Defendants, 112 East Third Street, Bethlehem, Pa.

[fol. 12] In District Court of the United States, Eastern District of Pennsylvania

[Title omitted]

Notice of Motion—Filed October 5, 1939

To Rutledge Slattery, Esq., and Frank P. Slattery, Esq., 2020 Packard Building, Philadelphia, Pa., Attorneys for Plaintiff.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Room —, New Customs House, Second and Chestnut Streets, Philadephia, Pennsylvania, on the 16th day of October, 1939, at

ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

(S.) H. P. McFadden, Attorney for Defendants, 112 East Third Street, Bethlehem, Pa.

[fol. 13] In District Court of the United States, Eastern District of Pennsylvania

[Title omitted]

Stipulation as to Certain Facts—Filed November 8, 1939

It is stipulated by and between the parties hereto that the allegations contained in Paragraphs 1 to 10, inclusive, of the Bill of Complaint are admitted.

Paragraph 11. It is admitted that the said Commonwealth of Pennsylvania by its duly qualified State Treasurer executed and delivered to the plaintiff an instrument purported to be an assignment of the claim of the Commonwealth to the plaintiff, a true and correct copy of which is hereunto attached marked Exhibit A.

Paragraph 12. The facts stated in Paragraph 12 are admitted; the defendant contends however that the purported assignment of a claim for $135,000 was without legal effect and that the plaintiff is entitled to be reimbursed only on a basis of the amount paid by the plaintiff to the Commonwealth.

The allegations contained in Paragraphs 13 and 14 are admitted.

Paragraph 15. It is admitted that the plaintiff claims as alleged in this paragraph, but the defendant contends that the plaintiff is only entitled to be reimbursed on the basis of the amount paid by the plaintiff to the Commonwealth.

Paragraph 16. It is admitted that the plaintiff claims as alleged in this paragraph, but the defendant contends that the plaintiff is not entitled to the recovery therein requested.

It is further stipulated that the above case is to be submitted to the Court on the basis of the complaint and this [fol. 14]stipulation for determination as on a rule for judgment on the pleadings.

(S.)Rutledge Slattery, (S.) Frank P. Slattery, Attorneys for Plaintiff. (S.) H. P. McFadden, Attorney for Defendant.

[fol. 15] EXHIBIT "A" TO STIPULATION AS TO CERTAIN FACTS

The American Surety Company of New York, New York, having become surety for The Bethlehem National Bank, Bethlehem, Pennsylvania, on its bond dated December 10, 1928, in the sum of One Hundred Twenty-five Thousand ($125,000) Dollars, unto the Commonwealth of Pennsylvania, securing deposits of state funds in said bank, and The Bethlehem National Bank, Bethlehem, Pennsylvania, having also posted collateral in the form of U. S. Treasury 3⅛% bonds, par value of $12,000, unto the Commonwealth of Pennsylvania; and the said The Bethlehem National Bank, Bethlehem, Pennsylvania, having been placed in the hands of a Conservator on or about March 7, 1933, and the Treasurer of the Commonwealth of Pennsylvania having on deposit at the time said bank was placed in the hands of a Conservator the sum of One Hundred Thirty-five Thousand ($135,000) Dollars and accrued interest amounting to One Thousand Five Hundred Thirty-nine and 95/100 ($1539.95) Dollars, secured by bonds as aforesaid; and the said Treasurer of the Commonwealth of Pennsylvania having made and filed due claim and demand with the Conservator in charge of said The Bethlehem National Bank, Bethlehem, Pennsylvania, for the amount due on said deposit with accrued interest, making a total of One Hundred Thirty-six Thousand Five Hundred Thirty-nine and 95/100 ($136,539.95) Dollars, and the said Treasurer of the Commonwealth of Pennsylvania having also made due claim and demand upon said American Surety Company of New York, New York, for payment of its liability for said deposit, pursuant to bonds as aforesaid:

Now, therefore, this is to acknowledge receipt from said American Surety Company of New York, New York, of the sum of Seventy Two Thousand Two Hundred Fifty-two and 77/100 ($72,252.77) dollars in full discharge of its liability under said bonds, (On March 27, 1934 the sum of Fifty-four Thousand ($54,000) Dollars of the aforementioned deposit [fol. 16] having been paid to the Commonwealth of Pennsylvania from The Bethlehem National Bank, Bethlehem, Pennsylvania, and on April 23, 1934 the above mentioned $12,000 par value of U. S. Government securities held as collateral to secure state deposits having been sold and the proceeds in the amount of $12,411.44 were credited to the

account of The Bethlehem National Bank, Bethlehem, Pennsylvania), and to subrogate said American Surety Company of New York, New York, to all the rights and remedies of the undersigned in the premises to the extent of Seventy Thousand Seven Hundred Thirty-eight and 90/100 ($70,738.90) Dollars, said last mentioned amount representing Sixty-eight Thousand Five Hundred Eighty-eight and 56/100 ($68,588.56) Dollars, the balance of state deposit, and Two Thousand One Hundred Fifty and 34/100 ($2,150.34) being the interest liability from January 1, 1933 to April 28, 1934, inclusive, of said The Bethlehem National Bank, Bethlehem, Pennsylvania, to the Commonwealth of Pennsylvania, for which said American Surety Company of New York, New York, was liable as surety; and the undersigned hereby assigns, transfers and sets over unto the American Surety Company of New York, New York, all his right, title and interest in and to his said claim against said The Bethlehem National Bank, Bethlehem, Pennsylvania.

Dated May 10, 1934.

Charles A. Waters, Treasurer of the Commonwealth of Pennsylvania

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

On this 10 day of May, 1934, before me, personally appeared Charles A. Waters, who, being by me duly sworn, did depose and say that he is Treasurer of the Commonwealth of Pennsylvania and that he, as such, has authority to execute the foregoing instrument, and he duly acknowl- [fol. 17] edged to me that he executed the same for the purposes therein mentioned.

William J. Kennard, Notary Public. My Commission Expires March 17, 1937. DS.

[fol. 18] I hereby certify the above to be a true and correct copy of the assignment as furnished the American Surety Company of New York, New York.

(Sgd.) J. S. Byerly, for Charles A. Waters, State Treasurer.

Received and filed June 8, 1934.

The Bethlehem National Bank, By —— ——, (Sgd.) Harry Margolis, Receiver.

[fol. 19] IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

OPINION SUR MOTION FOR JUDGMENT ON THE PLEADINGS—Filed March 6, 1940

Before Kirkpatrick, J.

This is a suit by the surety upon a bond, given by the now insolvent Bethlehem National Bank as security for the deposit of the Commonwealth of Pennsylvania, to recover dividends declared by the receiver. The right of the plaintiff to dividends is not disputed, but the amount is. The point at issue is the basis for the dividend, that is, the amount of the claim upon which it should be calculated and paid.

The case came before the Court upon a motion to dismiss but, inasmuch as it appeared at the argument that no facts were in dispute, the parties filed a stipulation (which for all practical purposes amounts to an amendment of the complaint and an answer admitting all fact allegations) and agreed that the Court should dispose of the case as on a rule for Judgment on the pleadings.

When the Bank closed, the Commonwealth's deposit amounted to $135,000. It was secured by the Bank's bond for $125,000 with the plaintiff as surety. As additional security the Bank had pledged bonds, of the par value of [fol. 20] $12,000, with the Commonwealth.

Seven months after the Bank closed, the Commonwealth was paid $50,000 by the plaintiff on account of its liability as the Bank's surety.

Five months later a dividend of 40% was declared, and the Commonwealth received an additional $54,000 from the receiver.

A month after that, the Commonwealth sold the pledged securities for $12,411.44, and shortly thereafter the plaintiff paid the Commonwealth $18,588.56, or the balance of its deposit. In all the plaintiff paid the Commonwealth $68,588.56, not counting interest.

The plaintiff takes the position that it is entitled to dividends upon the basis of the full amount of its principal's deposit in the Bank ($135,000). The receiver contends that the dividend should be on a basis, not of the full amount

of the deposit, but either (a) of the actual amount paid by the plaintiff to the Commonwealth in discharge of its suretyship liability ($68,588.56), or (b) of the amount of the deposit reduced by the amount of the Commonwealth's recovery from the pledged collateral ($12,411.44). Upon this latter theory, the basis of the dividend would be $122,588.66. The receiver has made tenders in accordance with both theories.

In stating the general principles which apply to this case it will be convenient to use the term "the creditor" when referring to the creditor secured by the surety bond (here the Commonwealth), and the term "general creditors" collectively for all other creditors entitled to share in dividends. The Bank is, of course, the debtor, and the plaintiff the surety.

The case before us is that of a surety asserting its right to dividends upon the whole claim of the creditor whom it secured, and to the benefit of the rule which would allow the creditor dividends on its claim without reduction by the realization from collateral. The creditor has received full payment of his claim. Part of it was paid by the debtor; part of it was realized from the debtor's collateral; and the surety has paid the balance. The debtor is insolvent.

[fol. 21] It is highly important to have clearly in mind that the surety is claiming subrogation—that is, substitution in place of the creditor. It also has (but is not here asserting) a direct claim against the debtor, as a creditor in its own right, by virtue of the debtor's implied agreement to indemnify it for any payment which it might be required to make under the contract of suretyship. The distinction between the two kinds of claims is pointed out clearly in Mellette etc. Co. v. H. Poehler Co., 18 F. (2d) 430.

The doctrine of subrogation is a device adopted or invented by equity to provide that debts ultimately will be discharged by those who in good conscience ought to pay them. Conversely, it is an appropriate means of preventing unjust enrichment. If a surety is made to pay, it is only just that he should have full reimbursement, out of the assets of the principal debtor, so far as it can be given him without injustice to others. The rights and interests which must be balanced in determining what is a just distribution are those of the surety, the creditor whom he has secured, and the general creditors.

As long as the creditor remains unpaid in whole or in

part it would be obviously unfair and unjust to him to permit the surety to receive any part of the estate of an insolvent debtor. To do so would decrease the creditor's dividend by his proportionate share of the payments to the surety, and thus allow the surety to compete against him—in derogation of the purpose of his contract of suretyship.

However, when the creditor has received everything due him and his claim has been discharged, there is no further reason, so far as he is concerned, why the surety's right to reimbursement should be suspended. This is, of course, true whether the creditor has been paid in whole by the surety or whether part of his claim has been recovered from the debtor or the debtor's collateral. There may have been some confusion about this formerly, but there is no doubt at the present time that where the claim of the creditor has been satisfied, from whatever source, surety is entitled to subrogation.

The creditor, having been paid, and so eliminated as a [fol. 2?] factor in the problem, it remains to balance the surety's rights and the interests of the general creditors. It is not easy to arrive at any solution which is entirely satisfactory and leaves one free from doubt as to the justice of the result. On the one hand, if the surety be allowed dividends on the full amount of the creditor's claim, they will be based upon an amount in excess of what he has expended, whereas the general creditors will be sharing only on the basis of their actual advancements. If, on the other hand, the surety is limited to the amount which he has actually paid as the basis of his claim, then the general creditors get a windfall, for no other reason than that one of them has bought and paid for additional protection which none of the others chose to take—for, of course, if there had been no suretyship, the creditor would be proving and receiving dividends on the full amount of his claim.

On the whole, it seems to me that, if the real objective of the doctrine of subrogation be kept in mind, we come closer to distributing the loss fairly and avoiding unjust enrichment of any interest by allowing the surety to claim on the basis of the full amount of the creditor's claim. By so doing it may be possible to reimburse him fully, and still do entire justice to the general creditors—for it can hardly be called unjust or unfair to leave them exactly where they would have been had there been no suretyship, with their rights neither impaired nor enlarged by an arrangement

with which they had nothing to do and which was purely fortuitous so far as they are concerned. To hold otherwise would really be to deny the surety subrogation altogether. If he be limited to the actual amount that he has expended or has contributed toward the payment of the creditor's claim, then he might as well come in as a direct creditor by virtue of the debtor's obligation to indemnify him.

Of course, a subrogated surety who has paid less than the entire amount of the creditor's debt will never be allowed to recover more than he has actually advanced, but, until he is made whole I see no reason why he should not be clothed with all the creditor's rights and remedies as they stood at the time of the debtor's insolvency.

This brings us to the question of the effect of the creditor's realization from the sale of the collateral. The creditor in this case had the right to prove and receive dividends [fol. 23] upon its full claim, as it stood at the time of the debtor's insolvency, without crediting collections from collateral pledged to secure the debt. This was settled beyond dispute in Merrill v. National Bank of Jacksonville, 173 U. S. 131, as the rule for the ratable distribution of the assets of an insolvent national bank. If the subrogee is to be placed as far as justly possible in the precise position of the one to whose rights he is subrogated, then he should be entitled to assert those rights as they stood at the date of insolvency, and the basis for his dividends, no more than that of the creditor, should not be cut down by the realization on collateral.

I am therefore of the opinion that the plaintiff is entitled to participation in the liquidation of the Bank on the basis of $135,000, or the full amount of the Commonwealth's claim, save that in no event can it receive more than it has actually paid the Commonwealth.

If the foregoing view of the plaintiff's rights is correct, there is no reason why interest should not be allowed. The dividend was declared and became payable immediately thereafter. It was never tendered to the plaintiff in full, nor was the partial tender in a form which the plaintiff could accept without waiving its rights to the balance.

Counsel fees are not allowable to the plaintiff.

The parties may submit an order for judgment in accordance with the foregoing opinion.

[fol. 24] Notes

(1) I do not regard the Pennsylvania decisions as controlling. What is involved here is the distribution of the assets of an insolvent national bank. Under the Federal Banking Law, distribution is to be "ratable," and it is for the Federal Court to determine what that means in each particular case. Of course, in so doing, considerations of underlying equitable principles as well as fairness and justice to all interests govern.

(2) The defendant relied principally upon two decisions of Circuit Courts of Appeals in other Circuits.

Ward v. First National Bank of Caruthersville, 76 F. (2d) 256, was a case in which the surety (not the creditor) held collateral pledged by the debtor. It is perhaps distinguishable upon that and the further ground that what was really involved was the surety's rights as a direct creditor of the debtor upon the latter's contract to indemnify it (though the Court seems to have observed no distinction between this right and the equitable remedy of subrogation). At any rate, the practical effect of the decision was to deny the surety the right of subrogation.

Md. Cas. Co. v. Cox, 104 F. (2d) 354, is, at any rate so far as certain statements contained in the opinion are concerned, in conflict with the principles upon which I have reached my conclusion in the present case. The Court there said, referring to a surety who had paid part of the creditor's claim (the balance having been recovered from other sources and the creditor paid in full), "It is as though the appellant had purchased a part of the debt. It did not pay the whole debt and is not entitled to collect upon the whole debt * * *." I can only say that, as applied to a case in which the creditor had been made whole, I can find no other authority for this statement of the law. It limits the surety to his claim on the debtor's contract of indemnity and, although the creditor is no longer interested, denies the surety the remedy of subrogation. It seems quite clear that the decisions go to this length only where the creditor's debt has not been [fol. 25] discharged. The Court in the Cox case also pointed out that there were other sureties on the same debt, and that to allow each of them to prove separately on the basis of the entire debt would be unfair and a duplication. No doubt it would be, but there should be no difficulty, under equitable rules, in pro-rating between sureties in a situation

of that kind. In the present case the question does not arise, because the plaintiff is the only surety.

The question does not seem to have been dealt with in this Circuit. Piedmont Coal Co. v. Hustead, 294 F. 247, would seem to indicate that the Court felt that a surety who has paid part of the claim is entitled to subrogation by way of substitution to the entire claim, even in a case where the creditor voluntarily remitted about 10% of the claim to the debtor, and so was not quite paid in full. However, I do not go so far as to say that I regard this case as dispositive of the present one, because it is not clear to what extent subrogation was allowed.

(3) It is a fact that the Commonwealth made an assignment of its entire claim to the plaintiff, but, inasmuch as I have fully sustained the plaintiff's position, upon the ground that it is entitled to be substituted for the Commonwealth by subrogation, it is unnecessary to consider whether, independently of that right, the plaintiff's position could have been sustained upon the assignment alone.

[fol. 26] In District Court of the United States, East[illegible] District of Pennsylvania

[Title omitted]

Stipulation and Motion for Substitution of Receiver Defendant—Filed March 18, 1940

And Now, this 14th day of March, 1940, it is stipulated by Rutledge Slattery, Esq., of counsel for plaintiff, and H. P. McFadden, Esq., counsel for defendants, that Edgar C. Dehne was duly appointed Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, on February 15, 1940 and that he has qualified as Receiver of said Bank and now is the duly constituted and qualified Receiver of said Bank, succeeding Benjamin Nieman; and said counsel respectfully move the Court to bring said Edgar C. Dehne upon the record in place and stead of Benjamin Nieman and make him a party defendant to this action.

(S.) Rutledge Slattery, Attorney for Plaintiff; (S.) H. P. McFadden, Attorney for Defendants.

[fol. 27] In District Court of the United States, Eastern District of Pennsylvania

[Title omitted]

Order of Substitution of Receiver Defendant—Filed March 18, 1940

And Now, this 18th day of March, 1940, upon consideration of the within Stipulation of counsel for plaintiff and defendants and upon their joint Motion, it is

Ordered that Edgar C. Dehne, who by due order of the Comptroller of the Currency of the United States on February 15, 1940, succeeded the defendant above named, Benjamin Nieman, as receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, be brought upon the record in place and stead of the said Benjamin Nieman and made a party defendant to this action.

By the Court:

Kirkpatrick, J.

[fol. 28] In District Court of the United States, Eastern District of Pennsylvania

[Title omitted]

Stipulation and Motion for Substitution of Receiver Defendant—Filed May 20, 1940

And Now, this 11th day of May, 1940, it is stipulated by Rutledge Slattery, Esq., of counsel for plaintiff, and H. P. McFadden, Esq., counsel for defendants, that L. M. Reed was duly appointed Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, on May 4, 1940 and that he has qualified as Receiver of said Bank and now is the duly constituted and qualified Receiver of said Bank, succeeding Edgar C. Dehne; and said counsel respectfully move the Court to bring said L. M. Reed upon the record in place and stead of Edgar C. Dehne and make him a party defendant to this action.

(S.) Rutledge Slattery, Attorney for Plaintiff; (S.) H. P. McFadden, Attorney for Defendants.

[fol. 29] IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ORDER OF SUBSTITUTION OF RECEIVER DEFENDANT—Filed May 20, 1940

And Now, this 20th day of May, 1940, upon consideration of the within Stipulation of counsel for plaintiff and defendants and upon their joint Motion, it is

Ordered that L. M. Reed, who by due order of the Comptroller of the Currency of the United States on May 4, 1940, succeeded the substituted defendant above named, Edgar C. Dehne, as receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, be brought upon the record in place and stead of the said Edgar C. Dehne and made a party defendant to this action.

By the Court:

Kirkpatrick, J.

[fol. 30] IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

STIPULATION OF COUNSEL FOR ENTRY OF JUDGMENT—Filed May 20, 1940

And Now, it is stipulated and agreed between Rutledge Slattery, Esq., counsel for plaintiff (and H. P. McFadden, Esq., counsel for defendants, that

Whereas, by Opinion filed March 6, 1940 in the above case the Court directed that the parties submit a form of order for judgment in accordance therewith, and

Whereas, the parties have agreed that the judgment herein may embrace as well the matter of a certain dividend distributed by and from the estate of the defendant bank after the institution of this suit as the matters averred in the complaint,

Therefore:

1. It is admitted that on the 5th day of February 1940 the Receiver of the defendant bank distributed a further

dividend of five per cent (5%) to creditors of said bank, and that said dividend has not been paid or tendered to the plaintiff upon the basis of $135,000 or any other principal basis or amount.

2. For the purpose of judgment in this suit the said dividend may be taken in all respects as having been averred and specifically claimed in the complaint, and the sum due and payable to the plaintiff by the defendants as and for said dividend may and shall be $6,750, being 5% of $135,000 [fol. 31] in accordance with the Opinion of the Court that the plaintiff's dividends are payable upon the sum of $135,000 until the plaintiff shall have received in dividends the sum of $68,588.56.

3. For the purpose of judgment in this suit legal interest shall be due and payable to plaintiff upon said $6,750 principal sum of said dividends, from the aforesaid date of payment to other creditors to the date of payment to plaintiff, in accordance with the Opinion of the Court that interest is due the plaintiff upon dividends due and unpaid to it.

4. The annexed form of order for judgment shall be submitted to the Court for approval and entry, in pursuance of the direction of the Court that the parties prepare and submit a form therefor.

5. Nothing herein shall prejudice or affect the right of the defendants to appeal from the judgment to be entered herein.

In Witness Whereof, said respective attorneys have hereunto set their hands the 13th day of May, 1940.

(S.) Rutledge Slattery, Attorney for Plaintiff, (S.) H. P. McFadden, Attorney for Defendants.

[fol. 32] In District Court of the United States, Eastern District of Pennsylvania

Civil Action No. 514

American Surety Company of New York, Plaintiff,

vs.

The Bethlehem National Bank of Bethlehem, Pennsylvania, and L. M. Reed, Substituted Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, Defendants

Order for Judgment—Filed May 20, 1940

This cause came on regularly to be heard before the above entitled court, Honorable William H. Kirkpatrick, Judge Presiding, on the 8th day of November, 1939, upon the complaint of plaintiff and on a stipulation which for all practical purposes amounts to an amendment of the complaint and an answer admitting all fact allegations, and by agreement of counsel that the court should dispose of the case thereon as on a rule for judgment on the pleadings. Rutledge Slattery, Esq. appearing on behalf of the plaintiff, and H. P. McFadden, Esq. appearing on behalf of the defendants. No testimony having been introduced but the cause having been submitted upon the complaint and stipulation and having been argued orally and upon briefs, and the court being fully advised in the premises, and having signed and filed herein its findings of fact and conclusions of law, and having directed that the parties submit a form of order for judgment in accordance therewith;

Now, therefore, by reason of the law and the findings aforesaid, and the annexed stipulation of counsel for the parties,

It is Hereby Ordered, Adjudged and Decreed:

1. That the defendant, L. M. Reed, Substituted Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, is hereby ordered and directed to pay to the plaintiff dividends upon the sum of $135,000, at the rate at which dividends have been paid or are payable to other depositors and creditors of said bank, until there shall so have been paid to the plaintiff the sum of $68,588.56.

[fol. 33] 2. It is further ordered, adjudged and decreed that the plaintiff do have and recover from the defendants, and each of them, plaintiff's costs herein incurred.

3. It is further ordered, adjudged and decreed that the plaintiff do have and recover from the defendants, and each of them, interest at the rate of 6% on $27,000 from December 10, 1935, and interest at the rate of 6% on $13,500 from July 16, 1938, and interest at the rate of 6% on $6,750 from February 5, 1940, until the plaintiff shall have received payment of all dividends heretofore declared by said defendants and not as yet paid to the plaintiff in accordance with said findings of fact and law filed in this matter on March 6, 1940.

By the Court:

Kirkpatrick, J.

[fol. 34] IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

NOTICE OF APPEAL—Filed June 18, 1940

Notice is hereby given that The Bethlehem National Bank of Bethlehem, Pennsylvania, and L. M. Reed, Substituted Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, Defendants above named, hereby appeal to the Circuit Court of Appeals for the Third Circuit from the granting of the Plaintiff's Motion for Judgment on the Pleadings and the entering of the following Order for Judgment in this case on May 20, 1940, in favor of the Plaintiff:

"It is Hereby Ordered, Adjudged and Decreed:

1. That the defendant, L. M. Reed, Substituted Receiver of The Bethlehem National Bank of Bethlehem, Pennsylvania, is hereby ordered and directed to pay to the plaintiff dividends upon the sum of $135,000, at the rate at which dividends have been paid or are payable to other depositors and creditors of said bank, until there shall so have been paid to the plaintiff the sum of $68,588.56.

2. It is further ordered, adjudged and decreed that the plaintiff do have and recover from the defendants, and each of them, plaintiff's costs herein incurred.

3. It is further ordered, adjudged and decreed that the plaintiff do have and recover from the defendants, and each

of them, interest at the rate of 6% on $27,000 from December 10, 1935, and interest at the rate of 6% on $13,500 from July 16, 1938, and interest at the rate of 6% on $6,750 from February 5, 1940, until the plaintiff shall have received payment of all dividends heretofore declared by said defendants and not as yet paid to the plaintiff in accordance with said findings of fact and law filed in this matter on March 6, 1940.

By the Court:

Kirkpatrick, J."

[fol. 35] (S.) H. P. McFadden, Attorney for Defendants, 112 East Third Street, Bethlehem, Pennsylvania.

[fol. 36] IN DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

STIPULATION AS TO RECORD ON APPEAL—Filed July 25th, 1940

And Now, it is stipulated and agreed between Rutledge Slattery, Esq., counsel for plaintiff and H. P. McFadden, Esq., counsel for defendants, that the following be included in the record on appeal to the United States Circuit Court of Appeals for the Third Circuit, in the above matter:

Docket Entries.
Complaint.
Motion to Dismiss and notice of motion.
Stipulation of counsel as to certain facts.
Opinion of the Court granting judgment for plaintiff on the pleadings.
Stipulation of counsel and Order of Court substituting defendant (March 18, 1940).
Stipulation of counsel and Order of Court substituting defendant (May 20, 1940).
Stipulation of Counsel as to entry of judgment.
Judgment in favor of plaintiff.
Notice of defendants' appeal with date of filing.

In Witness Whereof, said respective attorneys have hereunto set their hands the 25th day of July, 1940.

(S.) Rutledge Slattery, Attorney for Plaintiff; (S.) H. P. McFadden, Attorney for Defendants.

[fols. 37-38] In District Court of the United States, Eastern District of Pennsylvania

[Title omitted]

Order Extending Time to File Record—Filed July 31, 1940

And Now, July 31st, 1940, it is hereby ordered that the time for filing the record on appeal and docketing the action in the above matter, (the period of forty days from the date of the notice of appeal ending on July 28, 1940), be extended until August 7, 1940.

(S.) Kirkpatrick, J.

[fol. 39] In United States Circuit Court of Appeals for the Third Circuit

No. 7518—October Term, 1940

American Surety Company of New York,
Plaintiff-appellee,

vs.

The Bethlehem National Bank of Bethlehem, Pa., and L. M. Reed, Substituted Receiver of The Bethlehem National Bank of Bethlehem, Pa., Defendants-Appellants.

Minute Entry of Argument and Submission

And afterwards, to wit, the 23d day of October, 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable William Clark, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 27th day of November, 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT

[Title omitted]

OPINION—Filed November 27, 1940

Before Clark, Jones and Goodrich, Circuit Judges

GOODRICH, Circuit Judge.

At the closing of the Bethlehem National Bank of Bethlehem, Pa. the Commonwealth of Pennsylvania had on deposit $135,000. It was secured by the bank's bond for $125,000 with the plaintiff as surety. As additional security the bank had pledged bonds with the Commonwealth, par value of which was $12,000. These bonds were sold for $12,411.44. The Commonwealth received the first dividend of 40% in the course of liquidation of the bank and the plaintiff paid the Commonwealth the balance. The total amount paid by the plaintiff, not counting interest, was $68,588.56.

[fol. 41] The question before the court on this appeal is the basis upon which the plaintiff surety might prove and receive dividends. Plaintiff takes the position that it is entitled to dividends upon the full amount of its obligee's original bank claim which was $135,000. The court below, after a carefully prepared and thoughtfully reasoned opinion, sustained the plaintiff's view. The receiver contends that plaintiff is entitled to participate in the liquidation of the bank to the extent of a claim of $68,588.56, the amount it actually paid to the Commonwealth. There is also the question of whether the plaintiff is entitled to interest upon further dividends which have been declared and paid to other creditors, but which the plaintiff has not received.

The difficulty with regard to the decision is clearly stated by the trial court in this language: "It is not easy to arrive at any solution which is entirely satisfactory and leaves one free from doubt as to the justice of the result. On the one hand, if the surety be allowed dividends on the full amount of the creditor's claim, they will be based upon an amount in excess of what he has expended, whereas the general creditors will be sharing only on the basis of their actual advancements. If, on the other hand, the surety is limited to the amount which he has actually paid as the basis

of his claim, then the general creditors get a windfall, for no other reason than that one of them has bought and paid for additional protection which none of the others chose to take—for, of course, if there had been no suretyship, the creditor would be proving and receiving dividends on the full amount of his claim."

Nobody disputes the general right of a surety who pays a principal debtor's obligation to reimbursement and indemnity from the debtor whether expressly provided by contract or not. Nor does either party to this litigation dispute the general doctrine by which a surety who pays a creditor is subrogated to the creditor's rights. Restatement, Restitution § 162. The question here is much narrower, for it has to do, not with the broad principles of sub-[fol. 42] rogation, but with the rights of a surety who has paid a part of a claim against a national bank which is in liquidation. Both the lower court and the parties agree that the Pennsylvania decisions are not controlling because what is involved here is the distribution of assets of an insolvent national bank. Again to quote from the opinion below: "Under the federal banking law distribution is to be 'ratable' and it is for the federal court to determine what that means in each particular case. Of course, considerations of underlying equitable principles as well as fairness and justice to all interests govern".

One can make a formally logical argument in support of the surety's position. In Merrill v. National Bank of Jacksonville, 173 U. S. 131 (1898), it was held by the Supreme Court, though not without very vigorous dissent, that the "equity rule" was the one to be applied as between a debtor and the creditors where a national bank was in liquidation. By that decision a creditor was permitted to prove in the liquidation proceedings for the full amount of his claim notwithstanding he was protected by collateral which covered a large part of it. That decision, of course, binds this court.[1] But that case did not concern a surety and, therefore, is not directly in point here. However, if a surety, upon paying the creditor, is entitled to step exactly into the creditor's shoes by the doctrine of subroga-

[1] But an interesting paper by Mr. Ralph E. Clark in 15 Ill. L. Rev. 171, 180, suggests that a serious question is presented whether the Supreme Court would continue to support the "chancery" rule.

tion, it is arguable that he has all the rights which the creditor had, including the right to prove for the full amount of the claim. As a possible makeweight it can be added that the surety in this case took an assignment from the creditor, after the surety had paid the sum due the creditor. This makeweight, however, has no added force since, at the time of the assignment, the claim had been discharged. We do not think that the assignment added anything to the rights which the surety already had. See Louisville Trust Co. v. Royal Indemnity Co., 230 Ky. 482, 20 S. W. (2d) 71 (1929). [fol. 43] The flaw in the argument is the major premise that subrogation involves a complete assimilation by the one subrogated of all of the creditor's rights. It is another illustration of the point that one can get out of a major premise all that he puts into it. Subrogation is not an inflexible legal concept nor a hard and fast rule like that of the common law which required words of inheritance to create an estate in fee simple. It is simply an exercise of the equitable powers of a court and is allowed "only when it does not conflict with the legal or equitable rights of other creditors of the common debtor; and the principle is one of equity merely, and will be carried out in the exercise of a proper equitable discretion, with a due regard to the legal and equitable rights of others" Sheldon on Subrogation (2d ed. p. 5). For instance a surety company has recently been held not to be entitled to subrogation to the Commonwealth's preference over other depositors. South Philadelphia State Bank's Insolvency, 295 Pa. 433, 145 Atl. 520 (1929). Comment (a) of § 138 of the Restatement of Security, Tent. Dr. No. 4, states that "Subrogation is based on general principles of justice and does not spring from contract although it may be confirmed or qualified by contract. It is a mode which equity adopts to compel the discharge of a debt by the one who in good conscience ought to pay it. * * * Subrogation, as a creation of equity is subject to the limitation that it will not be allowed where it will prejudice the creditor or be inequitable to third persons."[2]

What, then, is the equitable rule to apply to this surety company to secure the "rateable distribution" required by

[2] The right of the surety to subrogation is stated to exist to the extent that he has contributed to the satisfaction of the creditor; Restatement, Security, Tent. Dr. No. 4, § 138.

the statute? We are not faced here with the problem of the choice between the "equity rule" and the "bankruptcy rule" involving the rights to participation by secured creditors.[3] We should not be free to choose in that situation [fol. 44] unless the Merrill case, which followed the equity rule, has been abandoned.

But the claimant here is not the secured creditor but his surety.[4] Considerations which tend to support the view that the secured creditor should not lose the benefit of his diligence in obtaining security, when it comes to proving his claim against the estate of an insolvent are inapplicable here. The risk that the debtor bank might become insolvent was the very thing which the surety company insured against and presumably was paid for so doing. That was the same risk which was taken by the unsecured depositors in the bank who, along with the surety, now seek an apportioned share of the bank's assets. There is only so much money to go around; the more one gets the less someone else will receive. The surety and the depositors shared the same risk. It seems fair that they should share, in partial compensation for their loss, on the same basis. The basis on which the depositors share is the proportion of their actual loss, the amount of their deposits. The surety's actual loss is the same that it paid out, which was $68,588.56. This, we think, is the basis on which it is entitled to claim. The plaintiff argues that such a rule penalizes the surety for prompt performance of his obligation. We think the contrary is true. If the surety wants to prove for the full amount it can do so by paying promptly the amount of the obligation for which it stands as surety. The amount received by the Commonwealth prior to payment by the surety did not hurt the surety because it reduced, by that much, what the surety had to pay.

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[3] For discussion of the merits of the two rules see Note 8 Minn. L. Rev. 232; Fred T. Hanson, A Secured Creditor's Share of an Insolvent Estate, 34 Mich. L. Rev. 309; Clark article cited in footnote I.

[4] Present day decisions abound with statements to the effect that the commercial surety, unlike the personal and often gratuitous surety, is not the special favorite of the law. See Sokoloff v. Fidelity & Casualty Co., 288 Pa. 211, 215, 135 Atl. 746 (1927); Annotations in 12 A. L. R. 382; 94 A. L. R. 876.

The result reached is in accordance with the decisions of Circuit Courts of Appeals in the Eighth and Sixth Circuits with the Sixth Circuit case directly in point. Ward v. First National Bank, etc., 76 F. (2d) 256 (C. C. A. 8, 1935); Maryland Casualty Co. v. Cox, 104 F. (2d) 354 (C. C. A. 6, 1939).

[fol. 45] The second point in the case raises the question whether the surety company is entitled to interest on the dividends payable to and received by the other creditors, but not by the surety. This applies to the second, third and fourth dividends. The receiver argues that the surety is not entitled to interest, at least on the second and third dividends, because plaintiff refused to take dividend offers made to it. The surety says that it was asked to sign a receipt admitting that the amount paid be accepted as a dividend upon the full claim of the plaintiff, which the receiver endeavors to explain by saying it "was no more than a general practice employed by the defendant bank" and admits that no actual tender of the dividends was made. The plaintiff company was entitled to dividends and the receiver of course does not dispute that fact. We think it clear that under these circumstances the surety's claim for interest was well founded and that the interest on its dividends should be allowed from the time such dividends were declared.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

A true Copy:

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 46] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1940

No. 7518

American Surety Company of New York, Appellee

vs.

The Bethlehem National Bank of Bethlehem, Pa., and L. M. Reed, Substituted Receiver of the Bethlehem National Bank of Bethlehem, Pa., Appellants

Judgment—Filed November 27, 1940

On appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and the cause is remanded to the said District Court for further proceedings.

Herbert F. Goodrich, Circuit Judge.

Philadelphia, November 27, 1940.

[File endorsement omitted.]

[fol. 47] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 48] Supreme Court of the United States

Order Allowing Certiorari—Filed March 31, 1941

The Petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.